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Supreme Court of the United States

October Term, 1975

No. 75-90

GENERAL TELEPHONE COMPANY OF OHIO,
Petitioner,

v.

GENE SLAGLE, INC.,

and

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

MOTION FOR LEAVE TO FILE JOINT BRIEF AMICI CURIAE AND JOINT BRIEF AMICI CURIAE IN SUPPORT OF PETITION

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Ohio Bell Telephone Company, The Cincinnati Gas & Electric Company, The Cleveland Electric Illuminating Company, Columbus and Southern Ohio Electric Company, The Dayton Power and Light Company, Ohio Edison Company, Ohio Power Company, The Toledo Edison Company, and Columbia Gas of Ohio, Inc., respectfully move this Honorable Court, pursuant to Rule 42 of the Rules of Court, for leave to file the attached joint brief *amici curiae* in support of the petitioner, General Telephone Company of Ohio, in this case. The consent of counsel for the petitioner and respondent The Public Utilities Commission of

Ohio has been requested and obtained. The consent of counsel for respondent Gene Slagle, Inc. has been requested, but refused.

The interests of each of the applicants individually and collectively and grounds in support of this motion are set forth as follows:

1. Each of applicants The Cincinnati Gas & Electric Company, The Cleveland Electric Illuminating Company, Columbus and Southern Electric Company, The Dayton Power and Light Company, Ohio Edison Company, Ohio Power Company and The Toledo Edison Company is an electric light company as defined in Ohio Revised Code Section 4905.03(A) (4) and hence a public utility as defined in Ohio Revised Code Section 4905.02, rendering electric service for light, heat and power purposes to consumers in the State of Ohio and subject to regulation, *inter alia*, with respect to rates and charges for such service by The Public Utilities Commission of Ohio. Collectively said applicants render substantially all of such electric service in Ohio subject to the jurisdiction of the Commission.

2. The Cincinnati Gas & Electric Company, The Dayton Power and Light Company, and The Toledo Edison Company are also natural gas companies as defined in Ohio Revised Code Section 4905.03(A)(6), as is Columbia Gas of Ohio, Inc., rendering gas service to consumers in various parts of Ohio. The Cleveland Electric Illuminating Company, The Dayton Power and Light Company, Ohio Edison Company and The Toledo Edison Company are also heating companies as defined in Ohio Revised Code Section 4905.03 (A) (9), rendering steam heating service to consumers in various locations in Ohio. With respect to such natural gas and steam service, your applicants are similarly subject to the jurisdiction of The Public Utilities Commission of Ohio with respect to the rates and charges made for such service.

3. Ohio Bell Telephone Company is a telephone company as defined in Ohio Revised Code Section 4905.03(A)(2), rendering telephone service to subscribers in a substantial part of the State of Ohio and is, in respect of such service, similarly subject to the jurisdiction of The Public Utilities Commission of Ohio.

4. Each of your applicants presently has, or recently has had, pending before The Public Utilities Commission of Ohio one or more applications for rate relief pursuant to Ohio Revised Code Section 4909.18, the same statute pursuant to which petitioner, General Telephone Company of Ohio (hereinafter sometimes referred to as General Telephone), initiated the proceeding for rate relief out of which arose the within Petition for Certiorari. Certain of your applicants have in the past been, and each of your applicants may in the future be, entitled to appeal to the Ohio Supreme Court from decisions of the Commission pursuant to Ohio Revised Code Section 4903.13 as was General Telephone Company in *General Telephone Co. v. Public Utilities Commission*, reported at 30 Ohio St. 2d 271, 285 N.E.2d 34 (1972). For example, The Cleveland Electric Illuminating Company was recently a party to an appeal before the Ohio Supreme Court, in which it was the appellant urging that an order of The Public Utilities Commission granting to it an increase in rates was insufficient in amount, precisely parallel to the appeal made by General Telephone Company in the proceeding reported as *General Telephone Co. v. Public Utilities Commission of Ohio, supra*. In that appeal the Ohio Supreme Court reversed in part and affirmed in part the decision of The Public Utilities Commission. Upon remand, the Commission issued an order purporting to apply the decision of the Ohio Supreme Court, dated January 29, 1975, and reported as *Gene Slagle, Inc. v. Public Utilities Commis-*

sion of Ohio, 41 Ohio St. 2d 44, 322 N.E. 2d 640 (1975), finding that the significantly lower rates in effect prior to the order appealed from were reinstated despite the fact that, as the Commission subsequently held by order dated July 3, 1975, the effect of the Ohio Supreme Court's decision was obviously to *increase* the rates of said utility.

5. The *Slagle* decision, *supra,* and the construction of the applicable Ohio statutes explicitly and implicitly there established, substantially and adversely affect the right of your applicants, and of all other public utilities subject to the jurisdiction of The Public Utilities Commission of Ohio, to exercise their constitutional right to an independent judicial review of orders of the Commission affecting rates and charges for utility services and, by imposing a substantial and, we believe, unconstitutional risk upon any utility which seeks review by the Ohio Supreme Court of such orders, deprives your applicants and any other such utilities of their property without due process of law, as set forth in detail in the brief appended hereto.

6. Your applicants are cognizant of the fact that the within Petition for Certiorari has already been briefed. The questions implicit in ths case, however, are of such crucial significance to the enterprises subject to the jurisdiction of The Public Utilities Commission of Ohio and are so capable of confusion in, if not invalidation of, the regulatory process in Ohio, results which it seems likely will neither be fully appreciated nor brought to the attention of the Court, that full consideration thereof is appropriate and participation herein by these applicants as *amici curiae* should be allowed.

Applicants will necessarily concentrate on the particular effect that the *Slagle* decision will have on their collective interests as utility companies. In the brief tendered with this motion, applicants treat the question of the constitutionality of the *Slagle* decision in the Ohio Supreme Court below more narrowly than does the brief submitted by the petitioner, General Telephone Co. Specifically, applicants emphasize that, in the area of public utility regulation, special judicial scrutiny must be applied to the regulating authority in order to protect the utilities from a confiscatory taking of their property. This judicial protection has taken the form of a constitutionally guaranteed right of appeal from the determinations of the regulatory authority. It is submitted that the *Slagle* decision below effectively renders that constitutionally protected right "nominal and illusory."

Hence, applicants submit that their interests as enumerated in the above recited relevant facts and points have not been, and will not be, adequately or fully presented by the parties presently before this Court.

For the foregoing facts and reasons, it is respectfully requested that this motion be granted.

Respectfully submitted,

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JOINT BRIEF OF AMICI CURIAE
In Support of Petition for a Writ of Certiorari

INTEREST OF THE AMICI CURIAE

This brief is filed on behalf of virtually all of the electric utilities in the State of Ohio, the State's largest telephone company, and a major natural gas company. All are seriously concerned with, and adversely affected by, the application of the Ohio Supreme Court's decision below reported as *Gene Slagle, Inc. v. Pub. Util. Comm'n*, 41 Ohio St. 2d 44, 322 N.E.2d 640 (1975) (hereinafter *Slagle*). The actual import of that case, simply stated, is that a utility seeking relief from The Public Utilities Commission of

Ohio must not only wait years in order to obtain such relief but, if it obtains only partial relief, must forego invoking judicial protection by way of appeal to the Ohio Supreme Court. For if it appeals and is successful, it must give up the benefit of the partial increase while it waits, perhaps for even more years, for the Commission to get around to its case again.

This is a completely new departure in the law of Ohio, appearing for the first time after some six decades of regulation. It is not only in conflict with consistent Ohio regulatory practice, but with the law of Ohio as previously laid down by the Ohio Supreme Court in *Cincinnati & Suburban Bell Telephone Co., v. Pub. Util. Comm'n*, 107 Ohio St. 370, 140 N.E. 86 (1923).

That this is no abstract question is forcefully demonstrated by a recent order of The Public Utilities Commission of Ohio affecting The Cleveland Electric Illuminating Company, one of the applicants herein. In an electric rate increase proceeding before the Commission this company was granted a partial rate increase, from which it took an appeal to the Ohio Supreme Court, a situation precisely parallel to that of petitioner, General Telephone Company of Ohio. In a decision reported as *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St. 2d 403, ___N.E.2d___ (1975), the Supreme Court of Ohio affirmed in part and reversed in part the decision of The Public Utilities Commission.

Thereafter, on June 16, 1975, The Public Utilities Commission of Ohio entered an order, a copy of which appears in the Appendix to this brief, finding that, under the doctrine of the *Slagle* case, the Company's rates had reverted to the significantly lower rate levels prevailing prior to its initial grant of an increase. It did this although, as it shortly thereafter recognized by its order dated July 3, 1975, a copy of which appears in the Appendix of this brief,

the obvious effect of the decision of the Ohio Supreme Court was to give to this particular utility a *higher* increase in rates than that previously granted.

ARGUMENT

I. PUBLIC UTILITIES HAVE A CONSTITUTIONALLY GUARANTEED RIGHT TO JUDICIAL REVIEW OF CONFISCATORY ORDERS ISSUED BY A STATE REGULATORY AGENCY.

Although the businesses conducted by persons such as your applicants are so affected with the public interest that they may lawfully be subject to regulation, including regulation as to rates, the imposition of such regulation conversely gives rise to a constitutional protection against the confiscation of their property. *Bluefield Water Works v. Pub. Service Comm'n*, 262 U.S. 679, 690 (1923). That is, while the legislature may fix rates either directly or through delegation to a regulatory agency such as The Public Utilities Commission of Ohio, a utility is entitled to *judicial protection* against the arbitrary exercise of that authority.

This principle has been accepted since the very beginning of modern public utility regulation. For example, in *Chicago, Milwaukee and St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418 (1890), this Court held that a Minnesota statute which made the rate findings of a regulatory commission conclusive and which denied judicial review, was unconstitutional.

> "This being the construction of the statute by which we are bound in considering the present case, we are of the opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and

with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice." 134 U.S. at 418.

Thus, a regulated utility is entitled, *as a constitutional matter,* to the independent judgment of a court in matters of this kind. As this Court said in *Ohio Valley Co. v. Ben Avon Borough,* 253 U.S. 287 (1920):

> "The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. * * * In all such cases, if the owner claims confiscation of his property will result, *the State must provide a fair opportunity for submitting that issue to a judicial tribunal* for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment." 253 U.S. at 289 (citations omitted; emphasis supplied).

The Ohio Supreme Court has hitherto consistently recognized this principle. In *Hocking Valley Ry. Co. v. Pub. Util. Comm'n,* 100 Ohio St. 321, 126 N.E. 397 (1919), that court said:

> "It will be observed that both before and since the constitutional amendment the legislature realized that in order to give validity to the proceedings and orders of the commission *it was necessary that some adequate provision for their judicial review should be made,* because if by legislative act or administrative order property or rights are taken or affected parties must be given full opportunity to show by judicial review that the taking or interference with rights or property was so arbitrary, unjust or unreasonable as to amount to a deprivation in violation

> of the constitution. This principle is nowhere denied. It is invoked and declared in *C., M. & St. P. Ry. Co. v. Minnesota,* 134 U.S. 418, and *Hocking Valley Ry. Co. v. The Public Utilities Commission et al.,* 92 Ohio St., 9, 14." 100 Ohio St. at 323.

And it is quite plain that not only must there be *some* provision for judicial review, but that provision must be a real, substantial one, whether we call it a "fair opportunity" as did this Court in the *Ohio Valley* case, *supra,* or an "adequate provision," as the Ohio Supreme Court did in *Hocking Valley Ry. v. Pub. Util. Comm'n, supra.* As this Court said in *Wadley Southern Ry. v. Georgia,* 235 U.S. 651 (1915), a decision quoted with approval by the Ohio Supreme Court in *Hocking Valley Ry. Co. v. Pub. Util. Comm'n, supra*:

> "The methods by which this right to a judicial review are secured vary in different jurisdictions. In some States there is a provision that within a designated time the order may be reviewed by the courts on the evidence submitted to the Commission. *Oregon R.R. & Nav. Co. v. Fairchild,* 224 U.S. 510; *State ex rel. Railroad Commission v. Oregon R.R. & Nav. Co.,* 68 Washington, 160, 167; *Seward v. Denver & R.G. R.R.,* 17 New Mex. 557; 131 Pac. Rep. 980. *Cf. Oregon R.R. & Nav. Co. v. Campbell,* 173 Fed. Rep. 957, 989. In others by proceedings in equity. In the Federal courts the method of procedure, when administrative orders are attacked as unconstitutional, is now regulated by § 266 of the Judicial Code as amended (March 4, 1913, c.160, 37 Stat. 1013, 1014). But in *whatever method enforced, the right to a judicial review must be substantial, adequate and safely available—but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield* to orders of uncertain legality rather than to ask for the protection of the law." 235 U.S. at 66 (emphasis supplied).

II. THE SLAGLE DECISION IN THE OHIO SUPREME COURT BELOW EFFECTIVELY RENDERS THE RIGHT OF A UTILITY TO APPEAL THE DECISION OF THE REGULATORY AGENCY "NOMINAL AND ILLUSORY."

The Ohio Supreme Court's decision below in *Slagle, supra,* effectively renders "nominal and illusory" the procedures for review of orders of the Public Utilities Commission in rate cases, procedures which heretofore the Ohio Supreme Court has held constitutional precisely because they provided for the Ohio Supreme Court's independent and neutral judicial judgment. *Hocking Valley Ry. Co. v. Pub. Util. Comm'n, supra.* As a practical matter, it will be a highly courageous, if not foolhardy, utility which, having received *part* of requested rate relief from the Commission, will venture to seek further relief from the Ohio Supreme Court.

Many of your applicants have, or have had, applications pending before the Ohio Commission for extraordinary rate relief and several have received such relief on express findings by the Commission of the existence of financial emergencies. To suggest that utilities in such straits will, upon receiving *some* rate relief after years of waiting, put it in jeopardy in order to seek their full constitutional entitlement is absurd. And this is true, despite the fact that *they are constitutionally entitled to do just that.* We submit that a construction of the Ohio statutes which produces this result is unconstitutional.

It is plain that a *practical* withdrawal of the right of appeal is just as unconstitutional as an express one. The situation is analogous to that presented to this Court in *Green v. United States,* 355 U.S. 184 (1957). There the Court held that where a defendant was indicted and tried for first degree murder but found guilty of second degree murder only and then was successful, on appeal, in reversing that conviction, he could not be tried a second time for first degree murder. This Court said:

> "[T]he Government contends that Green 'waived' his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a *successful* appeal of his improper conviction of second degree murder. We cannot accept this paradoxical contention. 'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. Cf. *Johnson v. Zerbst,* 304 U.S. 458. When a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he 'chooses' to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice." 355 U.S. at 191 (emphasis by the Court).

We submit that the Ohio Supreme Court's decision in *Slagle, supra,* means precisely the same thing, that a utility seeking rate relief and having obtained some, but less than that to which it believes itself entitled, "has no meaningful choice." As this Court said in *Green, supra*:

> "Reduced to plain terms, the Government contends that in order to secure the reversal of an erroneous conviction of one offense, a defendant must surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which he was not convicted and which was not involved in his appeal. Or stated in the terms of this case, he must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years' imprisonment. As the Court of Appeals said in its first opinion in this case, *a defendant faced with such a 'choice' takes a 'desperate chance' in securing*

the reversal of the erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma." 355 U.S. at 193 (emphasis supplied).

In short, where a constitutional right is involved, as one is here, the State simply cannot put a price on the right of appeal. *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969). That, however, is precisely what the Ohio Supreme Court did in *Slagle, supra.*

CONCLUSION

The decision by the Ohio Supreme Court in *Slagle* has in fact had the effect of imposing a penalty upon all Ohio public utilities for exercising a constitutionally guaranteed right of appeal from decisions of the state regulatory agency. This result effectively nullifies that right of appeal, a result contrary to both the statutes of Ohio as well as to the due process clause of the Fourteenth Amendment to the United States Constitution. For the foregoing facts and reasons, it is respectfully requested that this petition for certiorari be granted.

Respectfully submitted,

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APPENDIX

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

Case No. 71-634-Y

In the Matter of the Application of The Cleveland Electric Illuminating Company for authority to amend and increase its filed schedules fixing rates and charges for electric service.

Case No. 75-437-EL-ATA

In the Matter of the Application of The Cleveland Electric Illuminating Company to refile its rates.

ENTRY

(Entered June 16, 1975)

The Commission, coming now to consider the above-entitled matters and being fully advised in the premises, finds:

(1) By its opinion of June 11, 1975, in its Case No. 74-276, the Supreme Court of Ohio reversed in part and affirmed in part the order of this Commission in its Case No. 71-634-Y, wherein the Commission granted a general rate increase to the Cleveland Electric Illuminating Company.

(2) The Cleveland Electric Illuminating Company thereafter filed an application with the Commission requesting authority to refile the rates presently in effect pursuant to Commission order in Case No. 71-634-Y, which the Commission granted by its entry of June 13, 1975 (Case No. 75-437-EL-ATA).

(3) Upon advise of counsel and upon consideration of the Supreme Court's decision in *Slagle v. Public Utilities Commission*, 41 Ohio St. 2d 44 (1975), the Commission finds that its approval of the application in Case No. 75-437-EL-ATA was improper and that the entry approving the refiling of these schedules should be stricken from its Journal and held to be of no effect.

(4) Under *Slagle, supra*, the increased rates which have been charged and collected pursuant to the order appealed from may no longer be lawfully charged after the reversal by the Supreme Court and those rates in effect prior to the Commission's order in Case No. 71-634-Y are reinstated by operation of law.

It is, therefore,

ORDERED, That the above findings be observed. It is, further,

ORDERED, That copies of this entry be served upon all parties of record in the above-captioned cases.

THE PUBLIC UTILITIES COMMISSION OF OHIO

C. LUTHER HECKMAN, *Chairman*
SALLY W. BLOOMFIELD
DAVID SWEET, *Commissioners*

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

Case No. 71-634-Y

In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to amend and to increase its filed schedules for fixing rates and charges for electric service.

OPINION AND ORDER
(Entered July 3, 1975)

The Commission, coming now to consider the above-entitled matter, its Opinion and Order herein of November 28, 1973, the decision of the Supreme Court of Ohio in *Cleveland Electric Illuminating Company v. Public Utilities Commission*, 42 Ohio St. 2d 403 (1975) which affirmed in part and reversed in part that order, and being otherwise fully advised in the premises and in compliance with Section 4903.09 Revised Code, hereby renders its Opinion and Order on remand.

HISTORY OF THE PROCEEDINGS:

This case originally came before the Commission upon the application of The Cleveland Electric Illuminating Company for authority to increase its rates and charges for electric service. On November 28, 1973, this Commission issued its Opinion and Order granting, in part, the prayer of the application and authorizing applicant to increase said rates and charges, but not to the full extent requested by applicant. By Order dated January 22, 1974, the Commission accepted the new rates for filing. Applicant and the City of Cleveland and the Sierra Club, both of

which had duly intervened herein, appealed to the Supreme Court of Ohio from the Commission's Opinion and Order of November 28, 1973. On June 11, 1975 the Supreme Court issued its decision in *Cleveland Electric Illuminating Company v. Public Utilities Commission*, 42 Ohio St. 2d (1975), affirming in part and reversing in part this Commission's Opinion and Order of November 28, 1973. This matter has now come on for consideration by the Commission pursant [*sic*] to the mandate of the Supreme Court as set forth in that decision.

APPEARANCES:

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Messrs. Weston, Hurd, Fallon, Sullivan & Paisley, by Mr. Jerome S. Kalur, 2500 Terminal Tower, Cleveland, Ohio, on behalf of the Sierra Club, Intervenor.

Messrs. Thompson, Hine & Flory, by Messrs. William B. Wallace and Alan R. Lepene, Special Counsel, 1100 National City Bank Building, Cleveland, Ohio, on behalf of the City of Rocky River, Intervenor.

Ms. Daisy G. Collins, 1404 East Ninth Street, Cleveland, Ohio, on behalf of The Greater Cleveland Welfare Rights Organization, Inc., Intervenor.

Mr. Patrick A. Gareau, Director of Law, 21330 Center Ridge Drive, Rocky River, Ohio, and Mr. Gerald P. Wadkowski, Special Counsel, 85 East Gay Street, Columbus, Ohio, on behalf of the Cities of Westlake and Strongsville, Intervenors.

Honorable George E. Mastics, Ohio House of Representatives, 1001 Terminal Tower, Cleveland, Ohio, on his own behalf and on behalf of his electoral district, Intervenors.

Mr. William J. Brown, Attorney General of the State of Ohio, by Mr. Charles S. Rawlings and Ms. Cheryl Hachman, Assistant Attorneys General, 111 North High Street, Columbus, Ohio, on behalf of the staff of The Public Utilities Commission of Ohio.

COMMISSION REVIEW AND DISCUSSION:

In its opinion in *Cleveland Electric Illuminating Company v. Public Utilities Commission, supra,* the Supreme Court of Ohio affirmed this Commission's Opinion and Order of November 28, 1973 in certain respects and reversed it in others. For the purposes of this Opinion and Order on remand, as will become apparent hereinafter, there appears to be no need for this Commission to discuss or act upon a number of the points set forth in the Supreme Court's opinion, since it is clear that, on any interpretation of the Supreme Court's decision, applicant is entitled to the full rate increase requested in the application.

Although the Supreme Court dealt with several rate base items, deciding some rate base issues in applicant's favor and some adversely to it, with respect to only one rate base question did it reach a conclusion substantively adverse to applicant in the sense that it would result in a reduction of the rate base found appropriate by this Commission in its Opinion and Order of November 28, 1973. This relates to the question of properly crediting the al-

lowance for working capital with an offset for customers' contributions in the form of tax accruals. In this respect, the ninth paragraph of the syllabus of the Supreme Court's opinion reads as follows:

> "9. Customers' contributions in the form of accruals for the payment of taxes which will be constant with reasonable certainty and which are available for investments in materials and supplies or for use as working capital should be used as an offset on the allowance for working capital. (*Cincinnati v. Pub. Util. Comm.*, 161 Ohio St. 395, approved and followed)."

Thus, if we were to consider this issue alone, it is apparent that the rate base as previously found by this Commission must be reduced. As the Supreme Court noted in its opinion, however, the evidence as to the amount of any such reduction is conflicting. It is apparent that the most conservative possible approach to this issue, i.e. the approach most adverse to the interests of the applicant, would be the elimination of *all* working capital from the statutory rate base. On the other hand, the Supreme Court expressly held that the value of the filled land at the applicant's Lake Shore Power Plant is included in the rate base There was no dispute as to the value of that property, but only as to its includability. Thus, under the Supreme Court's decision, it is plain that that value, $418,000, should be added to the value of the Company's land and land rights. This would result in a statutory rate base for the purposes of this proceeding of $1,155,717,000 as indicated by the table below:

Land and land rights	$ 37,507	(000's)
RCNLD of property	1,118,210	
Working capital	- 0 -	
Rate Base	$1,155,717	

It will be noted that this computation does not take into consideration the decision of the Supreme Court as to the computation of the materials and supplies component of working capital which would tend to increase the rate base above that indicated. As discussed hereinafter, there is no need for the Commission to pursue its analysis of this question further at this time.

In so far as rate of return is concerned, the decision of the Supreme Court would, ordinarily, require a reevaluation of all of the components of the cost of capital which this Commission normally considers in determining a fair rate of return. Again, as will become clear hereinafter, there is no need for the Commission to make such a determination at this point. It is sufficient to note that the Supreme Court concluded that the inclusion of deferred credits at zero cost in determining a rate of return of 7.05% was unlawful. If we exclude the deferred credits component of the capital structure from the computation, holding all other elements constant, the effect upon the determination of the cost of capital is as follows:

	Percent of Total	*Cost*	*Weighted Cost*
Common	40.4	8.5	.034340
Preferred	6.8	7.4	.005032
Debt	52.8	6.5	.034320
	100.0		.073692

It will be observed that this computation does no more than eliminate the deferred credits at zero cost, restating the remaining components of capital structure as percentages of the total and, of course, developing the resulting weighted cost. No changes have been made in the assigned cost of the various components from those utilized in the staff approach originally adopted by this Commission in its Opinion and Order of November 28, 1973. Obviously,

in view of the Supreme Court's decision on the various rate of return issues, this is the computation which is most adverse to the position of the applicant. It results, as indicated, in a rate of return of 7.37%.

Application of a rate of return of 7.37% to the minimum rate base discussed above will result in an allowable dollar return in the amount of $85,176,343 which, when added to the allowable annual expenses of applicant for the purposes of this proceeding as previously determined by the Commission, would produce allowable gross annual revenue, with due regard to the income tax effect of the increase, of $319,721,729.

In its application, however, applicant requested an increase in rates which would produce allowable annual revenue of $319,473,248 (S.R. p. 8), which is less than the amount determined above. The Commission is of the opinion that the amount requested constitutes implicit acknowledgment by applicant that such revenues are sufficient to meet its normal expenses and carry on its operations [See *Dayton Power and Light Company*, Case No. 73-166-Y (February 63, [*sic*] 1975] and that the rate of return which such revenues would produce should be considered the fair rate of return for purposes of this proceeding. Accordingly, the Commission is of the opinion that there is no need for further analysis either of rate base or rate of return which otherwise might be required by the Supreme Court's decision.

The only remaining question relates to certain tariff issues heretofore determined by this Commission in its Opinion and Order of November 28, 1973. Specifically, the regulations in issue here deal with the time of access to customer premises, itemization of charges for special construction, and voltage variations, together with the fuel adjustment clause and certain promotional tariffs. In its

opinion the Supreme Court concluded that, when considering an application for a rate increase, this Commission "may not extend its inquiry to matters not put in issue by the applicant and not related to the rates which are the subject of the application." The Supreme Court, however, expressly refrained from attempting to categorize which of the five indicated matters, if any, fall within the realm of the Company's application or have an effect upon the rates. The Commission is of the opinion, and so finds, that the fuel adjustment clause and the promotional tariffs clearly "have an effect upon the rates" and the record supports the disposition made by this Commission on those questions in its Opinion and Order of November 28, 1973 which, to that extent, is incorporated herein.

The other matters referred to in the opinion of the Supreme Court in this connection present a much closer question and, if this proceeding were at a different stage it is possible that different result might be required. The record, however, reflects that the precise language in question with respect to each of these regulations was the result of discussions between the applicant and the Commission's staff and that there is evidence in the record to support the changes required by the Commission. In view of the fact that this matter has been pending before the Commission since October 7, 1971, and that there is no indication in the record that the Commission's determination on these points has been or will be prejudicial to applicant, the Commission will adopt the pertinent portions of its Opinion and Order of November 28, 1973 on these issues.

FINDINGS OF FACT:

From evidence of record in this proceeding, the Commission finds that:

1. The value of applicant's electric property used and useful for the service and convenience of the pub-

lic within the service area encompassed by this application, as of the date certain June 30, 1971, is not less than $1,155,717,000 and that, for the purposes of this proceeding on remand, no allowance for working capital will be made, resulting in a rate base for this proceeding of $1,155,717,000.

2. For the twelve month period ending December 31, 1971, the test period in this proceeding, the revenues, expenses and income available for fixed charges from the rates for electric service then being charged and collected in the area involved in this proceeding, are $268,930,886, $209,153,155, and $59,777,731, respectively.

3. This net annual compensation of $59,777,731 represents a 5.17 percent rate of return on a rate base of $1,155,717,000, which is insufficient to provide applicant with reasonable compensation for the electric service rendered to customers in the area in question.

4. The application herein constitutes a recognition by applicant that a rate of return of somewhat less than 7.37%, i.e. a rate of return which would produce the requested increase, is fair and reasonable and is sufficient to provide applicant just compensation and return on the value of the property used and useful in furnishing the service described in the application.

5. Applicant has recognized that a dollar return in the amount of $85,050,160 will provide it with reasonable compensation for the electric service rendered to customers in the territory affected by this application.

6. The annual expenses of applicant for the purposes of this proceeding are $234,423,088.

7. The gross annual revenue to which applicant is entitled for the purpose of this proceeding is the sum of the amounts set forth in Findings 5 and 6, or $319,473,248.

8. The applicant should submit tariff schedules consistent with this Opinion and Order and cancel and withdraw its presently effective tariffs.

CONCLUSIONS OF LAW:

1. Pursuant to the mandate of the Supreme Court of Ohio in *Cleveland Electric Illuminating Company v. Public Utilities Commission*, 42 Ohio St. 2d 403 (1975), the applicant should be authorized to cancel and withdraw its presently effective tariff provisions on file with this Commission and to file tariff provisions consistent with the Commisson's Discussion and Findings set forth above.

2. The effective date of the new tariffs shall be the first billing period after the Commission's approval of the tariffs filed pursuant to this Order.

ORDER:

It is, therefore,

ORDERED, That the applicant be, and hereby is, authorized to file tariffs consistent with the Discussion and Findings set forth above and to cancel and withdraw its present tariffs. It is, further,

ORDERED, That the tariff sheets authorized herein, should be submitted for approval by the Commission. Upon receipt of two (2) complete copies of said tariffs conforming to this opinion and order, the Commission will review and approve same by entry. It is, further,

ORDERED, That the effective date of the new tariff should be the first billing following Commission approval of the tariffs filed pursuant to this order. Applicant should notify each of its customer [*sic*] of the increase in rates and changes authorized herein by insert or attachment to this first billing. The proposed notice shall be submitted to the

Commission when applicant files its tariffs for approval. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

C. LUTHER HECKMAN, *Chairman*
SALLY W. BLOOMFIELD, *Commissioner*
DAVID SWEET, *Commissioner*